IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2341 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MR.MILINDBHAI S.GODBOLE - Appellant
Versus
THE STATE OF GUJARAT & 1 - Respondents

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Appearance :
MR KR RAVAL for Appellant:
MR. M.A. PATEL, LD. APP for Respondent: 1,
MR KAMAL M SOJITRA for Respondent: 2,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 02/02/2007

ORAL JUDGMENT

1. The appellant original complainant has preferred this appeal under section 378 of the Criminal Procedure Code, challenging the order dated

12/9/2006 passed by learned Metropolitan Magistrate, Court No.11, Ahmedabad in Criminal Case no. 358 of 2002, dismissing the complaint on account of absence of the complainant and his advocate.

2. This Court (Coram: S.R. Brahmbhatt, J) granted leave and admitted the appeal, and it was fixed for final disposal on 24/1/2007. This matter was required to be adjourned on account of absence of learned counsel for the respondent/accused. However, today it has been taken up for hearing.

3. The brief facts leading to filing of this appeal deserve to be set out as under:

3.1 The complaint filed by the complainant came to be registered as Criminal Case No. 358 of 2002 in the court of learned Metropolitan Magistrate Court against the accused for offence punishable under section 138 of the Negotiable Instruments Act. It is the case of the complainant that the complainant was always remaining present, but on the fateful day he and his advocate could not remain present in the first half of the day and the complaint came to be dismissed. In the second session he had rushed to the court but the matter was not restored and ultimately this was required to be challenged.

4.Shri. Raval, learned counsel for the appellant/ori. Complainant relied upon the decision of this Court in case of KUMBHAR DHULABHAI KALUBHAI V. PATEL GANESHBHAI FULABHAI AND ANR, reported in AIR 1969 Guj. pg. 176, and submitted that the complainant could not remain present only on one occasion and when there was no consistent absence of the complainant, the trial court ought not to have dismissed the complaint as the complainant has been rendered remedy-less against such orders, which is not passed on merits.

5.Shri. Sojitra, learned counsel for the respondent submitted that the complainant had not remained present nor his advocate remained present, therefore the trial court was within its right to dismiss the complaint.

6. This Court has perused the papers of the appeal and the accompaniments. The records & proceedings show that the complainant was not consistently remaining absent. The trial court had an option to adjourn the matter especially when complainant remained present in the second session. This fact has been stated on oath by the complainant. As against this, it deserves to be noted that the respondent / accused also remained absent on number of occasions. Shri. Sojitra submitted that the bailable warrant

issued against the accused had remain unserved, but that can not be a ground for consideration as he could have been successful in avoiding the warrant and this argument cannot be a ground for resisting the appeal. Therefore, in the interest of justice, the order impugned in the appeal deserve to be quashed and set aside. As the impugned order dismissing the complaint of the complainant has not been rendered on merits, the matter is required to be remanded back to the trial court.

6. Accordingly the appeal is partly allowed. The matter is ordered to be remanded back to the trial court. The trial court is hereby directed to dispose of the matter on merits after hearing learned counsels of the parties and after affording opportunity of leading their evidences. R & P be sent forthwith.

[S.R. BRAHMBHATT, J]

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